The Department of Labor Rescinds 2020 Joint Employer Rule

Aug 12, 2021

Categories:

Publications

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Effective September 28, 2021, the Department of Labor (DOL) will rescind its final rule "Joint Employer Status Under the Fair Labor Standards Act." Originally issued on January 16, 2020 by the Trump administration, the rule provided increased clarity on what type of employment relationships constituted joint employment. However, the DOL's rescission of that rule will likely increase confusion in this area and make it easier for organizations to be held liable as joint employers under the Fair Labor Standards Act (FLSA).

The FLSA defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee." The 2020 Joint Employer Rule held that four factors determined joint employer status – whether the alleged joint employer: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of pay; and (4) maintains the employee's employment records. Under this test, no single factor was dispositive. To be considered a joint employer, employers had to exercise control over the workforce at issue. It was not enough to simply have the authority to exercise control.

The previous rule was a welcomed change for employers because it provided much needed clarity. This permitted organizations who had relationships with other employers to construct policies and procedures to separate their relationships and ensure they were not joint employers.

The DOL provided the following explanation for rescinding the rule: "The rescinded rule included a description for joint employment contrary to statutory language and Congressional intent. The rule also failed to take into account the department's prior joint employment guidance." This rescission also comes on the heels of a New York District Court decision in September 2020 striking down the final rule.

According to the DOL, "[t]he U.S. Department of Labor's Wage and Hour Division will continue to follow the law and judicial precedent

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when evaluating joint employer relationships to enforce worker protections."

The DOL will likely draft a new rule that will expand the definition of employer and hold more organizations liable as joint employers. The new rule will likely mirror the economic realities test used in previous administrations. The DOL Wage and Hour Division previously noted that "the concept of joint employment, like employment generally, 'should be defined expansively.'" Under the economic realities test, the ultimate question is whether the employee is economically dependent on the alleged joint employer – not whether the employer exercises control. The following factors have typically been considered:

- Directing, controlling, or supervising the work performed
- Controlling employment conditions
- Permanency and duration of the relationship
- Repetitive and rote nature of work
- Integral to the business
- Work performed on the premises
- Performing administrative functions commonly performed by employers

In practice, this test permits for a broader interpretation of what constitutes employment. Employers should be mindful that the 2020 standard is no longer valid and the DOL will likely aggressively pursue joint employer cases going forward.

For more information, please contact Neal Shah, Brice Smallwood, or any attorney in Frost Brown Todd's Labor and Employment practice group.

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